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12
13 UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15
16 UNITED STATES OF AMERICA, and the
PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*
17 DEPARTMENT OF FISH AND GAME, the
CALIFORNIA REGIONAL WATER QUALITY
18 CONTROL BOARD, SAN FRANCISCO BAY REGION,
the CALIFORNIA REGIONAL
19 WATER QUALITY CONTROL BOARD
LAHONTAN REGION

20 Plaintiff,

21 v.

22 KINDER MORGAN ENERGY PARTNERS, L.P.
23 and SFPP, L.P.

24 Defendants.
25
26
27
28

Civil Action No.

COMPLAINT

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1 The United States of America, by the authority of the Attorney General of the United
2 States and acting at the request of the United States Environmental Protection Agency ("EPA"),
3 the Department of the Interior ("DOI") (acting by and through the United States Fish and
4 Wildlife Service), and the People of the State of California *ex rel.* California Department of Fish
5 and Game, the California Regional Water Quality Control Board, San Francisco Bay Region, and
6 the California Regional Water Quality Control Board Lahontan Region (collectively the "State"),
7 file this Complaint to enforce both State and Federal environmental protection statutes and
8 regulations, against Kinder Morgan Energy Partners, LP., and SFPP, LP (hereinafter referred to
9 collectively as "Kinder Morgan" or "Defendants"), and allege as follows:

10 **I. INTRODUCTION**

11 1. This is a civil action brought pursuant to the Clean Water Act ("CWA"),
12 33 U.S.C. §§ 1251 *et seq.*, the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq.*;
13 Sections 9(a)(1) and 11(a)(1) of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1538(a)(1),
14 1540(a)(1); the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, California
15 Government Code §§ 8670.1 *et seq.*, the California Fish and Game Code, and the Porter Cologne
16 Water Quality Control Act, California Water Code §§ 13000 *et seq.* Plaintiffs seek civil
17 penalties, injunctive relief, response costs and -natural resource damages as a result of the
18 violations alleged herein

19 **II. JURISDICTION, VENUE AND NOTICE**

20 2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1345, 1355
21 and 1395(a); Sections 309(b) and 311(b)(7)(E) of the CWA, 33 U.S.C. §§ 1319(b) and
22 1321(b)(7)(E); and Section 1017(b) of OPA, 33 U.S.C. § 2717(b); Sections 11(c) of the ESA, 16
23 U.S.C. §§ 1540(c) Authority to bring this action is vested in the United States Department of
24 Justice by 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

25 3. The Court has supplemental jurisdiction over the State's claims pursuant to
26 28 U.S.C. § 1367(a) because the State's claims are so related to the United States' claims that
27 they form part of the same case or controversy. This Court also has jurisdiction over the subject
28 matter of the State's OPA claim under 33 U.S.C. § 2717(b).

4. Venue is proper in the Eastern District of California pursuant to 28 U.S.C. §§ 1391(b) and 1395(a); Sections 309(b) and 311(b)(7)(E) of the CWA, 33 U.S.C. §§ 1319(b) and 1321(b)(7)(E), inasmuch as it is the judicial district in which the Defendants do business and in which a substantial portion of the activities alleged herein occurred.

III. PARTIES

5. Plaintiff United States is a sovereign nation.

6. Plaintiff California Department of Fish and Game (“CDFG”), is the trustee, on behalf of the people of the State of California, for fish, wildlife and their habitat, and is responsible for the enforcement of the California Fish and Game Code. The CDFG has been designated as a State Trustee for natural resources pursuant to 1006 (b)(3) of OPA and subpart G of the National Contingency Plan. The CDFG’s Office of Spill Prevention and Response is also responsible for the enforcement of the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (Government Code Section 8670.1 et seq.). The CDFG seeks civil penalties pursuant to California Fish and Game Code Section 5650.1 and California Government Code Section 8670.66(a)(3). Additionally, the CDFG seeks response costs and natural resource damages pursuant to Section 1002 of OPA, California Government Code Section 8670.56.5 (h), and California Fish and Game Code Sections 2014, 5655, 12015 and 12016. Plaintiffs California Regional Water Quality Control Board, San Francisco Bay Region, and California Regional Water Quality Control Board, Lahontan Region (“Regional Boards”) are California state agencies responsible for the water quality of the waters of California, and responsible for the enforcement of the Porter-Cologne Water Pollution Control Act, Water Code Sections 13000 *et seq.* The Regional Boards seek penalties for damage to the waters of California pursuant to California Water Code Section 13350.

7. Defendant Kinder Morgan Energy Partners, L.P. (“KMEP”) is a limited partnership with its principal place of business in Delaware. Defendant SFPP, L.P., (“SFPP”) is organized under Delaware law and is an operating limited partnership of KMEP.

IV. FACTS GIVING RISE TO LIABILITY

1 8. Defendants operate underground oil pipelines and other onshore facilities
2 throughout the United States, including the state of California. One underground pipeline
3 operated by SFPP is the Line Section 12, which is partially located in Solano County, California.

4 9. On or about April 27, 2004, approximately 2,947 barrels of diesel fuel discharged
5 from the Defendants' Line Section 12 pipeline into the Suisun Marsh and adjoining shorelines, in
6 Solano County, California (the "Suisun Discharge"). The diesel fuel was an "oil" and a
7 "pollutant" within the meaning of the Clean Water Act.

8 10. The Suisun Discharge was not authorized under the Clean Water Act, or any other
9 federal, state, or local government law, regulation, or ordinance. The discharge of oil occurred as
10 a result of the conduct, acts and omissions of Defendants, and each of them, and their employees,
11 agents or other individuals while acting within the course and scope of their employment for such
12 Defendants.

13 11. The Suisun Marsh is a navigable waters of the United States within the meaning
14 of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) The waters of Suisun Marsh are waters of
15 the state as defined in California Water Code Section 13050(e).

16 12. The Suisun Discharge was a discharge of oil in a "quantity as may be harmful"
17 within the meaning of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(2) and 40 C.F.R. § 110.5.

18 13. The oil from the Suisun Discharge caused injuries to natural resources in the
19 Suisun Marsh, including injuries to salt marsh habitat and associated wildlife, including
20 shorebirds and Salt Marsh Harvest Mice. Salt Marsh Harvest Mice are listed as an endangered
21 species under the ESA and the California Endangered Species Act, California Fish and Game
22 Code §§ 2050, et seq., and at 50 C.F.R. § 17.11(h).

23 14. The Defendants owned or operated the Line Section 12 pipeline at the time of said
24 discharge of oil.

25 15. The Line Section 12 pipeline is an "onshore facility" within the meaning of the
26 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and Section 1001(24) of OPA, 33 U.S.C.
27 § 2701(24)
28

1 16. On or about February 7, 2005, approximately 1,831 barrels of oil discharged from
2 the Defendants' Line Section 42 pipeline, reaching the Oakland Inner Harbor, near Oakland, in
3 Alameda County, California (the "Oakland Discharge").

4 17. The Oakland Inner Harbor is a navigable waters of the United States within the
5 meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7). The waters of Oakland Inner
6 Harbor are waters of the state as defined in California Water Code section 13050(e).

7 18. The Oakland Discharge was a discharge of oil in a "quantity as may be harmful"
8 within the meaning of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(2) and 40 C.F.R. Part 110.

9 19. The Defendants owned or operated the Line Section 42 pipeline at the time of said
10 discharge of oil.

11 20. The Line Section 42 pipeline is an "onshore facility" within the meaning of the
12 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and Section 1001(24) of OPA,
13 33 U.S.C. § 2701(24).

14 21. On or about April 1, 2005, approximately 300 gallons of oil discharged from
15 Defendants' Line Section 12 pipeline into Summit Creek and other waters of the United States in
16 the Donner Lake watershed and adjoining shorelines, near Truckee, in Placer County, California
17 (the "Donner Discharge"). The oil was an "oil" and a "pollutant" within the meaning of the Clean
18 Water Act.

19 22. Summit Creek is a navigable waters of the United States within the meaning of
20 Section 502(7) of the CWA, 33 U.S.C. § 162(7). The waters of Summit Creek are waters of the
21 state as defined in California Water Code section 13050(e).

22 23. The Donner Discharge caused injuries to natural resources in and along Summit
23 Creek, including oiling of rocky stream habitat and associated benthic organisms.

24 24. The Donner Discharge was a discharge of oil in a "quantity as may be harmful"
25 within the meaning of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(2) and 40 C.F.R. Part 110.

26 25. The Defendants owned or operated the Line Section 12 pipeline at the time of the
27 Donner Discharge.

26. The Line Section 12 pipeline is an “onshore facility” within the meaning of the 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and Section 1001(24) of OPA, 33 U.S.C. § 2701(24).

V. CLAIMS FOR RELIEF

First Cause of Action:
Civil Penalties Under the CWA

27. Paragraphs 1 through 26 are realleged and incorporated by reference.

28. Defendants' discharges of oil as alleged herein violates Section 311(b)(3) of the CWA, 33 U.S.C. §§ 1311(a) and 1321(b)(3), and pursuant to Section 311(b)(7)(A) of the CWA, 33 U.S.C. § 1321(b)(7)(A), subject Defendants to a civil penalty of up to \$1,100 per barrel of oil discharged.

Second Cause of Action:
Injunctive Relief Under the CWA

29. Paragraphs 1 through 26 are realleged and incorporated by reference.

30. Defendants' discharges of oil as alleged herein violates Section 301(a) of the CWA, 33 U.S.C. § 1311(a), , and subjects Defendants to injunctive relief pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b). Accordingly, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), the United States, acting on behalf of EPA, is entitled to appropriate injunctive relief.

Third Cause of Action: Endangered Species Act Penalties

31. Paragraphs 1 through 26 are realleged and incorporated by reference.

32. Defendants' Suisun Discharge of oil as alleged herein resulted in the "take" of a species in violation of Section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1), and subjects Defendants to a civil penalty pursuant to Section 11(a) of the ESA, 16 U.S.C. § 1540(a).

Fourth Cause of Action:
Natural Resource Damages under OPA

33. Paragraphs 1 through 26 are realleged and incorporated by reference.

1 34. "Oil" as defined in section 1001(23) of OPA, 33 U.S.C. § 2701(23), was
2 discharged during the Suisun Discharge into the Suisun Marsh and adjoining shorelines, in
3 Solano County, California.

4 35. "Natural resources," as that term is defined in section 1001(20) of OPA, 33 U.S.C.
5 § 2701(20), held in trust by the state and federal trustees, have been injured, destroyed, or lost as
6 the result of the discharge of oil from the Defendants' Line 12 pipeline into navigable waters,
7 within the meaning of 33 U.S.C. § 2702(b)(2).

8 36. Under section 1002 of OPA, 33 U.S.C. § 2702, Defendants are responsible for the
9 pipeline from which oil was discharged into navigable waters or adjoining shorelines and are
10 liable for damages caused, thereby including but not limited to damages for injury to, destruction
11 of, loss of, or loss of use of natural resources and the reasonable costs of assessing the damages.

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13 Fifth Cause of Action:
14 Damages under Lempert-Keene-Seastrand Oil Spill
 Prevention and Response Act - Government Code Section 8670.56.5(h)

15 37. Plaintiff CDFG refers to and incorporates by reference as though fully set forth
16 herein each and every foregoing paragraph of this complaint.

17 38. The waters of the Suisun Marsh and Oakland Inner Harbor are "marine waters," as
18 defined in California Government Code Section 8670.3(i).

19 39. The petroleum product discharged in the Suisun Discharge and the Oakland
20 Discharge was "oil" as defined in California Government Code Section 8670.3(n).

21 40. The Suisun Discharge releasing over approximately 2,947 barrels of oil into the
22 Suisun Marsh constitutes a "spill" or "discharge" of oil as these terms are defined in California
23 Government Code Section 8670.3 (aa).

24 41. The unauthorized spill or discharge from the Defendants' Line Section 42
25 pipeline, which released approximately 1,831 barrels of oil and resulted in greater than 1 barrel
26 entering Oakland Inner Harbor, constitutes a "spill" or "discharge" of oil as these terms are
27 defined in California Government Code Section 8670.3(aa).

42. The Line Section 12 pipeline and the Line Section 42 pipeline are “marine facilities” as defined in California Government Code Section 8670.3(g)(1).

43. The Defendants are each a "responsible party" as defined in California Government Code Section 8670.3(w).

44. The Suisun Discharge constitutes a "discharge of oil into or onto marine waters" as those terms are defined in California Government Code Section 8670.3(i), (n) and (aa).

45. The Oakland Discharge constitutes a "discharge of oil into or onto marine waters" as those terms are defined in California Government Code Section 8670.3(i), (n) and (aa).

46. The State has incurred costs and damages, including damages for injuries to the natural resources under its trusteeship, as a result of the discharge or leaking of oil into or onto marine waters.

47. Defendants and each of them are strictly liable under California Government Code Section 8670.56.5(f) and (h) without regard to fault for all damages resulting from the Suisun Discharge and the Oakland Discharge, including, but not limited to: damages for injury to, destruction of, loss of, or loss of use and enjoyment of natural resources; injury to real or personal property; loss of taxes; response costs and costs of assessing natural resource damages; and for attorneys fees, costs of suit and expert witnesses.

Sixth Cause of Action:
Damages under California Fish and Game Code Section 2014

48. Plaintiff CDFG refers to and incorporates by reference as though fully set forth herein each and every foregoing paragraph of this complaint.

49. Plaintiff CDFG is informed and believes, and based on such information and belief alleges that the oil discharged by Defendants and each of them has caused and will continue to cause the taking and destruction of birds, mammals, fish, reptiles, or amphibian protected by the laws of the State of California, within the meaning of California Fish and Game Code Section 2014.

50. Defendants' discharges of oil are unlawful in that:

1 a. Oil is a substance or material deleterious to fish, plant life, or bird life and
2 was deposited in, permitted to pass into, or placed where it could pass into waters of the state, a
3 violation of California Fish and Game Code Section 5650.

4 b. By virtue of the acts alleged above, plaintiff CDFG is informed and
5 believes, and based on such information and belief alleges that Defendants and each of them
6 unlawfully or negligently discharged oil that proximately caused, and will continue to cause, the
7 taking or destruction of birds, mammals, fish, reptiles, or amphibian protected by the laws of the
8 State of California.

9 51. Defendants and each of them are jointly and severally liable under California Fish
10 and Game Code § 2014 for all detriment proximately caused by the taking or destruction of birds,
11 mammals, fish, reptiles, or amphibian protected by the laws of the State of California.

12 Seventh Cause of Action:
13 Damages under California Fish and Game Code Section 12015

14 52. Plaintiff CDFG refers to and incorporates by reference as though fully set forth
15 herein each and every foregoing paragraph of this complaint.

16 53. By virtue of the Suisun Discharge, the Oakland Discharge and the Donner
17 Discharge, Defendants and each of them are responsible for polluting, contaminating, or
18 obstructing waters of the State or depositing or discharging materials threatening to pollute,
19 contaminate, or obstruct waters of the State, to the detriment of fish, plant, bird, or animal life in
20 those waters.

21 54. Defendants and each of them are responsible for removing the materials placed in
22 waters of the State and removing the materials threatening to pollute, contaminate, or obstruct
23 waters of the State, or for paying the costs of removal incurred by CDFG.

24 55. CDFG has incurred costs in connection with the removal of the materials placed
25 in waters of the State by Defendants.

26 56. Defendants and each of them are liable under California Fish and Game Code
27 Section 12015 to the CDFG for all reasonable costs incurred in removal of materials.

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2 Eighth Cause of Action:
3 Damages under California Fish and Game Code Section 12016

4 57. Plaintiff CDFG refers to and incorporates by reference as though fully set forth
5 herein each and every foregoing paragraph of this complaint.

6 58. By virtue of Suisun Discharge, the Oakland Discharge and the Donner Discharge,
7 Defendants and each of them discharged or deposited oil into the waters of the State.

8 59. Oil is a substance or material deleterious to fish, plant, bird, or animal life or their
9 habitat within the meaning of California Fish and Game Code Section 12016(a).

10 60. Plaintiff CDFG is informed and believes, and based on such information and
11 belief alleges that the petroleum for which Defendants and each of them is responsible has
12 caused damage to fish, plant, bird, or animal life and their habitats.

13 61. Defendants and each of them are liable under California Fish and Game Code
14 Section 12016 to the CDFG for all actual damages to fish, plant, bird, or animal life and/or their
15 habitat.

16 62. Defendants and each of them are liable under California Fish and Game Code
17 Section 12016 to the CDFG for all reasonable costs incurred in cleaning up the oil or abating its
18 effects.

19 Ninth Cause of Action:
20 Damages under California Fish and Game Code 5655

21 63. Plaintiff CDFG refers to and incorporates by reference as though fully set forth
22 herein each and every foregoing paragraph of this complaint.

23 64. The oil discharged from the Suisun Discharge, the Oakland Discharge and the
24 Donner Discharge was "petroleum" or a "petroleum product" as defined in California Fish and
25 Game Code Section 5655(d).

26 65. By virtue of the acts alleged above, Defendants and each of them discharged or
27 deposited petroleum and/or a petroleum product into the waters of the State.

28 66. Pursuant to California Fish and Game Code Section 5655, the CDFG may clean
up or abate or cause to be cleaned up or abated, the effects of any petroleum or petroleum product

1 deposited or discharged in the waters of this state or order any person responsible for the deposit
2 or discharge to clean up the petroleum or petroleum product or abate the effects of the deposit or
3 discharge, and recover any costs incurred as a result of the cleanup or abatement from the
4 responsible party.

5 67. Plaintiff CDFG has incurred costs associated with the cleanup or abatement of the
6 Suisun Discharge, the Oakland Discharge, and the Donner Discharge.

7 68. Defendants and each of them are liable under California Fish and Game Code
8 Section 5655 to the CDFG for all reasonable costs incurred in cleaning up the petroleum or
9 abating its effects.

10 Tenth Cause of Action:
11 State Penalties under California Government Code Section 8670.66(a)(3)

12 69. Plaintiff CDFG refers to and incorporates by reference as though fully set forth herein
13 each and every foregoing paragraph of this complaint.

14 70. By virtue of the acts alleged above, Defendants acted intentionally or negligently and
15 those intentional or negligent acts resulted in the unauthorized discharges of oil into marine waters.

16 71. Defendants are liable for penalties of not less than \$25,000 or more than \$500,000
17 for each negligent or intentional discharge into marine waters, pursuant to California Government
18 Code Section 8670.66(a)(3).

19
20 Eleventh Cause of Action:
21 State Penalties under California Fish and Game Code Section 5650.1

22 72. Plaintiff CDFG refers to and incorporates by reference as though fully set forth herein
23 each and every foregoing paragraph of this complaint.

24 73. California Fish and Game Code Section 5650 prohibits the deposit or placement of
25 any petroleum or petroleum product where it can pass into the waters of the State.

26 74. Defendants, through the Suisun Discharge, the Oakland Discharge and the Donner
27 Discharge, caused petroleum and/or petroleum product to be deposited and placed where it can pass
28 into the waters of the State.

1 75. Pursuant to California Fish and Game Code Section 5650.1, Defendants are subject
2 to up to \$25,000 in penalties for each act of depositing or placing petroleum or petroleum product
3 where it can pass into the waters of the State according to proof.

4 Twelfth Cause of Action:
5 State Civil Penalties under California Water Code Section 13350

6 76. Plaintiffs Regional Boards refer to and incorporate by reference as though fully set
7 forth herein each and every foregoing paragraph of this complaint.

8 77. California Water Code Section 13350(a)(3) prohibits the discharge of any oil or any
9 residuary product of petroleum in or on any waters of the State, except in accordance with waste
10 discharge requirements.

11 78. Defendants, through the Suisun Discharge, the Oakland Discharge and the Donner
12 Discharge, caused such discharges of oil into and on waters of the State in violations of California
13 Water Code Section 13350(a)(3).

14 79. California Water Code section 13350(d) provides for civil liability for violations of
15 Water Code Section 13350 on a per gallon basis not to exceed twenty dollars for each gallon of
16 waste discharged. Defendants are liable for civil penalties to the Regional Boards for such
17 discharges pursuant to Water Code section 13350.

18 **VI. PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs, the United States of America, and the People of the State of
20 California *ex rel.* the Department of Fish and Game, the California Regional Water Quality
21 Control Board, San Francisco Bay Region, and the California Regional Water Quality Control
22 Board, Lahontan Region respectfully request that this Court enter judgment against the
23 Defendants for:

24 a. Civil penalties of up to \$1,100 per barrel of oil discharged for the spills
25 alleged in the Complaint in violation of Section 311(b)(3), 33 U.S.C. § 1321(b)(3);

26 b. Civil penalties of up to \$500,000 for each discharge of oil into marine
27 waters alleged in the Complaint in violation of California Government Code Section
28 8670.66(a)(3);

1 c. Civil penalties of up to \$25,000 for each act of depositing or placing
2 petroleum or petroleum product where it can pass into the waters of the State as alleged in the
3 Complaint in violation of California Fish and Game Code Section 5650.1;

4 d. Civil penalties of up to \$25,000 for each knowing violation of Section
5 309(a) of the ESA, 16 U.S.C. § 1538(a);

6 e. Civil liabilities for the spills alleged in the complaint in violation of
7 California Water Code Section 13350(a)(3);

8 f. Damages, including but not limited to damages for injury to, destruction
9 of, loss of, or loss of use of natural resources, and costs of assessing natural resource damages;

10 g. Costs including response, containment, cleanup, removal, treatment,
11 monitoring, administration costs, and for attorneys fees, costs of suit and expert witnesses;

12 h. Such injunctive relief pursuant to Section 309(b) of the CWA, 33 U.S.C.
13 § 1319(b), as may be necessary to prevent future CWA violations; and

14 i. Such other relief as the United States and the State may be entitled.

15
16 Respectfully submitted,

17 For PLAINTIFF, United States:

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